Supreme Court, U.S.
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No. 99-1975

In The

Supreme Court of the United States

MICHAEL E. CASEY,

Petitioner,

v.

ROBERT E. RHOADES, AS TRUSTEE FOR THE FIRSTBANC SAVINGS ASSOCIATION EMPLOYEE STOCK OWNERSHIP PLAN, ALL OTHER PARTICIPANTS IN THE FIRSTBANC EMPLOYEE STOCK OWNERSHIP PLAN; THE OFFICE OF THRIFT SUPERVISION and THE TEXAS SAVINGS AND LOAN DEPARTMENT,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT ROBERT E. RHOADES' BRIEF IN OPPOSITION

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TO THE SUPREME COURT OF THE UNITED STATES:

This brief is filed on behalf of Respondent, Robert E. Rhoades, as trustee for the FirstBanc Savings Association Employee Stock Ownership Plan ("ESOP").

STATEMENT OF THE ISSUE OPPOSED

The district court did not commit plain error in awarding Respondent's attorneys' fees and expenses for bringing this interpleader action.

OPINIONS BELOW

This response is timely filed pursuant to an extension of the time for filing until August 9, 2000. This response is intended to address only the fifth error Michael Casey ("Casey") asserts in his Petition; namely, that an award of attorneys' fees in the district court to the Plaintiff-in-Interpleader was outside the discretion of the district court. This brief will also address Casey's assertions or implications that the Trustee Robert Rhoades ("Trustee" or "Rhoades") did not act in good faith or violated his fiduciary duties by filing this interpleader. Respondent expects that the Office of Thrift Supervision ("OTS") and/or the Texas Savings and Loan Department ("TSLD") are filing briefs addressing the first four points asserted by Casey, which concern the substantive application of the Employee Retirement and Income Security Act ("ERISA").

REASONS FOR DENYING THE WRIT

Respondent asserts that this Court should deny the Petition, particularly in relation to Petitioner's complaint about the district court's award of attorneys' fees and expenses. Petitioner merely complains that the district court abused its discretion, even though that decision is wholly left to the trial court's discretion, a fact the Fifth Circuit clearly recognized. The trial court did not commit plain error (the correct standard) by its award of attorneys' fees and expenses.

SUMMARY OF THE ARGUMENT

First, Casey has waived any argument contesting the award of attorneys' fees or the propriety of the interpleader action itself. To allow Casey to now assert as error a matter to which he never objected, despite many opportunities, at trial, is inequitable and counter to the letter and intent of both the Federal Rules of Civil Procedure and relevant case law.

Second, interpleader was proper in this case. The stakeholder (i.e., Robert Rhoades, the Trustee) simply deposited a limited fund that could have been subject to multiple claims and would have subjected the Trustee to potential multiple claims of liability. Interpleader is proper even if threats of multiple vexation to the claim may be prospective in nature. Further, Casey's own motion for summary judgment recognizes the propriety of the interpleader action, and other potential claimants filed claims to the disputed stake.

Finally, the district court did not commit plain error in awarding attorneys' fees to Rhoades. Rhoades' only objective in this litigation, as clearly established by his pleadings and other actions, was shielding the limited fund from exposure to multiple liabilities. Additionally, evidence in the record supports the award of attorneys' fees. Federal jurisprudence is well settled: an award of attorneys' fees is proper in this case.

ARGUMENT

I. A Litigant May Not Assert As Error On Appeal An Issue Never Contested At Trial.

Casey's brief to this Court raises two arguments that Casey did not raise in the district court. For the first time on appeal, Casey alleges that the Trustee acted improperly in bringing this interpleader action. Also for the first time, Casey challenges the district court's award of attorneys' fees to Rhoades. Arguments not raised in the district court are waived on appeal. *See, e.g., Garcia v. Excel Corp.*, 102 F.3d 758, 759 (5th Cir. 1997) ("[W]e will not consider on appeal matters not first considered by the trial court."); *Forbush v. J.C. Penney Co.*, 98 F.3d 817, 822 (5th Cir. 1996) ("This Court will not address an argument raised by a party for the first time on appeal."); *FM Properties Operating Co. v. City of Austin*, 93 F.3d 167, 173 (5th Cir. 1996) ("[W]e do not consider on appeal a claim not presented to the district court."). Therefore, Casey has waived these arguments.

Rhoades' original petition makes clear the conflicting claims to the disputed funds, thereby necessitating this

interpleader, and Rhoades' intent to seek a fee award. Further, Rhoades designated as experts his attorneys to testify on the subject of attorneys' fees, making it clear that Rhoades intended to pursue his attorneys' fees as Plaintiff-in-Interpleader.

Casey did not object to Rhoades' filing of this interpleader action, the qualifications of Rhoades' experts on the subject of attorneys' fees, or the awarding or the amount of the award of attorneys' fees to Rhoades in (1) his motion to dismiss pursuant to Rule 12(b)(6); (2) his designation of experts; (3) his motion for summary judgment; (4) perhaps most importantly, his response to Rhoades' motion for discharge; and, (5) his motion for a new trial. To allow Casey to assert on appeal error which was not contested at trial offends equitable principles and is contrary to the broad pleading rules established by the Federal Rules of Civil Procedure.

Alternatively, the Fifth Circuit correctly applies the "plain error" standard since Respondent first challenged the award on appeal. *See* Appendix to Petition at 22. Respondent failed to meet this standard because the award does not implicate the substantial rights of the parties and does not seriously affect the fairness, integrity or public reputation of judicial proceedings. *See Rizzo v. Children's World Learning Centers, Inc.*, 173 F.3d 254 (5th Cir. 1999); *Crawford v. Falcon Drilling Co.*, 131 F.3d 1120, 1124 (5th Cir. 1997); *Russell v. Plano Bank & Trust*, 130 F.3d 715 (5th Cir. 1997).

II. This Interpleader Is Proper.

The Trustee did not violate his contractual or statutory duties owed to Casey or any other plan members by properly filing this interpleader action. The amount in controversy consists of the shares, benefits, or interest in the FirstBanc Savings Association ESOP potentially belonging to Casey, the former FirstBanc President and Managing Officer.

The Trustee filed this interpleader action only after it became apparent that the disposition of these funds was subject to conflicting orders from the OTS, the TSLD, the Internal Revenue Service ("IRS"), and Michael Casey. All of the other participants in the ESOP were also made defendants in this lawsuit since they have vested interests in the ESOP, meaning that they may have interests in that portion of the ESOP fund to which Casey makes claims and that were addressed in the OTS order and the TSLD order.

While Casey made a claim to the disputed funds, the OTS and the TSLD directed Rhoades to comply with the terms of their respective orders regarding Casey. However, if Rhoades had complied, he would have risked liability under the anti-alienability provisions of ERISA, (*e.g.*, 29 U.S.C. § 1056(d) (1994)) and the Internal Revenue Code § 407(a)(13)(A) (1994). Rhoades could also have been exposed to sanctions for discrimination against an ESOP participant under 29 U.S.C. §§ 1140, 1141 (1994).

Under 28 U.S.C. § 1335 (1994) and Federal Rule of Civil Procedure 22, this interpleader action is proper

because two or more adverse claimants of diverse citizenship claimed entitlement to a disputed portion of the ESOP funds. Rhoades was or could have been exposed to double or multiple liability concerning payment of Casey's purported share of the ESOP funds. Rhoades had reasonable grounds to anticipate rival claims for the ESOP funds. *See James P. Talcott, Inc. v. Allahabad Bank, Ltd.*, 444 F.2d 451, 468 (5th Cir. 1971). Interpleader is proper even when the threats of multiple vexation to the funds are prospective, because the current interpleader provision authorizes interpleader with two or more persons who claim or may claim interests in the disputed funds. *See* 28 U.S.C. § 1335(a)(1) (1994); *Country Club Dairy Co. v. Peoples Bank*, 169 F. Supp. 699, 701 (W.D. Mo. 1959).

Finally, Casey's own Motion for Summary Judgment recognizes the propriety of this interpleader action. Casey states in his Summary Judgment Motion as follows:

> Robert Rhoades, the ESOP trustee, and his lawyers properly recognized that the purported waiver of benefits in the Cease and Desist Order between Casey and the government likely violated ERISA's prohibition of alienation of pension benefits. [footnote omitted] Rhoades brought this action in response. With this Court's permission, Mr. Rhoades interpled the amount of $77,064.04, representing Mr. Casey's share of the ESOP benefits.

III. The District Court Did Not Commit Plain Error in Awarding Attorneys' Fees to the Trustee.

A district court possesses the discretion to award costs and attorneys' fees in interpleader actions. *See Corrigan Dispatch Co. v. Casa Guzman*, 696 F.2d 359, 364 (5th Cir. 1983); *see also Perkins State Bank v. Connolly*, 632 F.2d 1306, 1311 (5th Cir. 1980) (holding that there is a federal interest in protecting the stakeholder in his pursuit of attorneys' fees in an interpleader action and that costs and attorneys' fees are generally awarded by federal courts to the plaintiff who initiates the interpleader as a mere stakeholder); *Gulf Oil Corp. v. Olivier*, 412 F.2d 938, 946 (5th Cir. 1969) (concluding that costs and attorneys' fees are ordinarily awarded to the disinterested stakeholder in an interpleader proceeding and that the matter is ultimately vested within the sound discretion of the trial judge). This proposition is "well settled" under federal law. *See Id.* The Fifth Circuit court correctly held that the trial court's award of attorneys' fees was not plain error. *See* App. at 22-23; *Crawford*, 131 F.3d at 1124; *Nickel v. Estes*, 122 F.3d 294, 301 (5th Cir. 1997). Respondent has presented no argument to this Court that the trial court committed plain error.

Casey asserts that Rhoades was not a disinterested stakeholder. Rhoades' pleadings and other actions in the case clearly establish that Rhoades' only concern was preventing the fund from being subject to multiple liabilities, and that Rhoades did not take a position as to the validity of Casey's claim at any time during these proceedings. For example, in Plaintiff's Motion for Discharge of Plaintiff and Award of Attorneys' Fees, the Trustee

alleged the factual circumstances of the OTS and TSLD ordering Casey to forfeit his rights to the disputed ESOP funds, and Casey and the other ESOP participants claiming the rights to the disputed funds regardless of the orders. Plaintiff's Motion goes on to state that Plaintiff filed the interpleader action in good faith and has taken no action that favors or furthers any of the Defendants' rights to the funds.

Moreover, evidence in the record supports the award of attorneys' fees. Rhoades designated the following as experts in his filing of June 21, 1996: Robert B. Neblett III, Brandon C. Janes and Jeffrey T. Knebel on behalf of the firm of Small, Craig & Werkenthin. The witnesses were designated as licensed attorneys and it was made clear that the witnesses might offer their testimony and opinions regarding the reasonableness and necessity of attorneys' fees incurred in this matter.

In Plaintiff's Motion for Discharge of Plaintiff and Award of Attorneys' Fees filed February 18, 1997, counsel for the Plaintiff, Jeffrey T. Knebel, submitted an affidavit regarding the type and scope of services performed by attorneys in representing Plaintiff Rhoades, which included significant amounts of legal preparation over the course of a year and a half for this litigation. No parties objected to Plaintiff's Motion for Discharge or any of the evidence submitted therewith, including the type and scope of services and the requested amount of the attorneys' fees awarded. Exhibit "A" to that affidavit contained a detailed, itemized billing record for this matter. In determining an award of attorneys' fees in an interpleader action, it is proper for the court to determine the fee from the evidence of the Plaintiff in the form of an

affidavit and statements by his attorney as to the services rendered. *Lincoln Income Life Insurance Co. v. Harrison*, 71 F.R.D. 27 (W.D. Okla. 1976).

This was a complicated case involving the application of a complex, specialized statute and a collateral criminal investigation. Numerous settlement and other discussions required the time of Rhoades' counsel and their efforts to facilitate any settlement reached among the OTS, TSLD, Casey, and other ESOP participants. The district court was well aware of the time Rhoades' counsel was devoting to the case and the reasons for those time demands, as evidenced by the numerous pleadings Rhoades' counsel filed with the Court, discovery responses Rhoades filed with the Court, and discussions at two separate hearings in Houston before the Court, including progress talks on settlement discussions between the parties. The district court took those factors into account in determining the reasonableness of its attorneys' fees award, and exercised sound discretion in doing so.

CONCLUSION

Casey never objected in any way to the propriety of this interpleader action or of Rhoades' attorneys' fees at the trial level. Any arguments he forwards to this Court should, therefore, be viewed as untimely and waived. Alternatively, the district court did not commit plain error in awarding Rhoades his attorneys' fees and should be affirmed.

Robert Rhoades acted appropriately in bringing this interpleader action. There is a federal interest in protecting the stakeholder in such an action in order to encourage the use of interpleader in appropriate disputes. Federal courts uniformly recognize that federal interest and widely hold that an award of attorneys' fees to a Plaintiff-In-Interpleader is proper in a case such as this one.

Therefore, Respondent requests that this Court deny the Petition for Writ of Certiorari regarding the trial court's award of attorneys' fees and expenses to Respondent.

Respectfully submitted,

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